

Supreme Court, U. S.

FILED

OCT 27 1977

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-617

TERMINAL-HUDSON ELECTRONICS, INC.,
OF CALIFORNIA, dba OPTI-CAL,

Appellant,

vs.

DUNDAS, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEAL, FOURTH APPELLATE DIS-
TRICT, STATE OF CALIFORNIA

CHARLES W. ANSHEN

139 South Beverly Drive
Suite 203
Beverly Hills, CA 90212
(213) 550-1529

Attorney for Appellant

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1977

No. _____

TERMINAL-HUDSON ELECTRONICS, INC.,
OF CALIFORNIA, dba OPTI-CAL,

Appellant,

vs.

DUNDAS, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEAL, FOURTH APPELLATE DIS-
TRICT, STATE OF CALIFORNIA

CHARLES W. ANSHEN

139 South Beverly Drive
Suite 203
Beverly Hills, CA 90212
(213) 550-1529

Attorney for Appellant

TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
OPINION BELOW	1
GROUND OF JURISDICTION	2
QUESTIONS PRESENTED	4
STATEMENT OF THE CASE	4
FEDERAL QUESTIONS ARE SUBSTANTIAL	6
CONCLUSION	7
APPENDIX A OPINION OF THE COURT OF APPEAL FOURTH DISTRICT, SECOND DIVISION, STATE OF CALIFORNIA Filed June 24, 1977	
APPENDIX B BUSINESS AND PROFESSIONS CODE OF THE STATE OF CALIFORNIA SECTIONS 2556 and 2558	

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200 43 Ld.2d 482	3, 7

Connally v. General Const. Co. 269 U.S. 385, 70 L.Ed. 322 46 S.Ct. 126 (1926)	7
---	---

<u>Statutes</u>	
28 U.S.C. § 1257(2)	2, 3, 7

Business and Professions Code of the State of California	.
§ 2556	3, 4, 6
§ 2558	3, 4
Civil Code § 3369	4, 5

Constitution

United States Constitution	.
Article 14, Section 1	4
Fifth Amendment	2, 5
Fourteenth Amendment	2, 5

Rules

Rule 15 of the Rules of the United States Supreme Court	1
ii.	

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. _____

TERMINAL-HUDSON ELECTRONICS, INC.,
OF CALIFORNIA, dba OPTI-CAL,
Appellant,

vs.

DUNDAS, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEAL, FOURTH APPELLATE DIS-
TRICT, STATE OF CALIFORNIA

JURISDICTIONAL STATEMENT

Appellant submits herewith his jurisdictional statement as required by Rule 15 of the Rules of the Supreme Court of the United States.

OPINION BELOW

The Opinion of the Court of Appeal,
Fourth Appellate District, Second Division,

1.

State of California has not been reported. The Decision of the Supreme Court of the State of California Denying Hearing has not been reported.

GROUNDS OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2) since the case involves the question of whether a statute of the State of California, both on its face and as construed and applied, is repugnant to the due process clause of the Fourteenth Amendment and the Fifth Amendment to the Constitution of the United States. The Opinion sought to be reviewed of the Court of Appeal, Fourth District, Second Division, State of California was dated and entered on June 24, 1977, and was not published but is attached hereto as Appendix "A". An order Denying Rehearing was dated July 12, 1977, and an Order Denying a Petition for Hearing by the Supreme Court of the State of California was filed on August 18, 1977.

2.

A Notice of Appeal to the Supreme Court of the United States was filed on October 19, 1977 in the Court of Appeal, Fourth District, Second Division of the State of California.

28 U.S.C. § 1257(2) has been sustained to grant jurisdiction for the United States Supreme Court where the question of validity of a State statute on the ground that it is repugnant to the constitution in that "a civil litigant may seek review in the United States Supreme Court of any Federal claim properly asserted in and rejected by the State Courts." Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482.

The validity of Business and Professions Code § 2556 of the State of California which reads in pertinent part,

"...; to directly or indirectly, employ or maintain on or near the premises used for optical dispensing, a refractionist, an optometrist, a physician or surgeon,"

and violation of said section is made a criminal offense by Business and Professions Code § 2558.

3.

QUESTIONS PRESENTED

Whether the use of the word "near" as an operative word in a criminal statute is so vague and ambiguous as to be repugnant to the due process clause of the United States Constitution , Article 14, Section 1, and the Fifth Amendment.

STATEMENT OF THE CASE

Thirty-four optometrists brought an action for injunction against the appellant and others to enjoin the appellant from employing an optometrist by an optician alleging that such acts were violative of Civil Code § 3369 of the state of California, in that such conduct was "unfair competition."

The Board of Medical Examiners intervened as Plaintiff alleging a violation of the Business and Professions Code § 2556 (a criminal statute under Business and Professions Code § 2558) in that the appellant employed or maintained near the premises used for optical dispensing an optometrist and Civil Code § 3369.

The Board of Optometry intervened as Plaintiff alleging violations of certain sections of the optometry law and Civil Code § 3369.

The facts are that the appellant in some cases furnished the premises to the optometrists, in some cases at no charge, and paid the optometrists a subsidy in addition to the fees the optometrists collected from his patrons.

In every case the premises of the optometrist are separated from that of the optical dispensing firm by a solid wall (partition) to the ceiling and are entered by a separate doorway and entrance from the public street or public portion of a shopping center.

The federal question was raised by the appellant at the trial level in his answers to all of the appellant's complaints as an affirmative defense in that said code sections were violative of appellant's rights under the Fifth and Fourteenth Amendments of the Constitution of the United States.

The federal question was again raised by the appellant in his briefs to the

California Court of Appeal and to the California Supreme Court.

The trial court found that appellants had not employed an optometrist but had maintained an optometrist near the premises used for optical dispensing in violation of Business and Professions Code § 2556 and issued an injunction to prevent the appellant from further violations.

FEDERAL QUESTIONS ARE SUBSTANTIAL

The federal question presented in this appeal is so basic that it is foundational to due process. As cited in the appellant's opening brief to the Court of Appeal for the State of California:

"The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and

differ as to its application violates the first essential of due process of law." Connally v. General Const. Co., 269 U.S. 385, 70 L.Ed. 322, 46 S.Ct. 126 (1926), such question was ignored by the state courts in this action.

Jurisdiction is proper since the federal question presented by the appellant at the trial court and appellate courts were ignored by such courts and appellant hereby invokes the jurisdiction of the United States Supreme Court under 28 U.S.C. § 1257(2) (supra) and Huffman v. Pursue (supra).

CONCLUSION

Appellant submits that this appeal brings before the court a substantial federal question which requires plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,
CHARLES W. ANSHEN

Attorney for Appellant

APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH DISTRICT
SECOND DIVISION
STATE OF CALIFORNIA

Court of Appeal-Fourth Dist.

F I L E D
JUN 24 1977

Ervin J. Tuszykski, Clerk
M. Gather, Deputy Clerk

ROBERT O. DUNDAS, O.D., et al.,) 4 Civil
Plaintiffs and Respondents,) 15874
v.) (Sup.Ct.
OPTICAL CORPORATION OF)
CALIFORNIA, et al.,)
Defendants and Appellants,) OPINION
CALIFORNIA STATE BOARD OF)
OPTOMETRY, and CALIFORNIA)
STATE BOARD OF MEDICAL)
EXAMINERS,)
Plaintiffs in Intervention,)
and Respondents.)

APPEAL from the Superior Court of Orange County.

Claude M. Owens and Robert L. Corfman,
Judges. Affirmed.

Charles W. Anshen for Defendants and
Appellants.

Wilke, Fleury, Goffelt & Gray by

A-1.

William A. Gould, Jr. for Plaintiffs and Respondents.

Evelle J. Younger, Attorney General, and Samuel E. Spital, Deputy Attorney General, for Plaintiffs in Intervention and Respondents.

Plaintiffs, a group of optometrists, brought this action for injunctive relief against defendant corporation, a chain dispensing optician. Respondents are the State Board of Optometry and California State Board of Medical Examiners (now renamed for no discernible reason The Board of Medical Quality Assurances).

The evidence disclosed, and the trial court found, that defendants established offices to sell glasses in shopping centers, then partitioned off a portion of the premises for optometrists' offices. Defendants completely furnished the offices of the optometrists with equipment and used strawmen to sublease the offices to the optometrists. Defendants exercised complete control of the optometrists. Defendants made appointments for them and advertised for them. The optometrists filed

daily reports with and had their working hours approved by the defendants. Sometimes defendants' employees answered the telephone for the optometrists and on one occasion defendants cancelled an optometrist's lease when he took an unauthorized vacation. Defendants charged nominal or no rental for these fully-equipped optometrists' offices and further provided the optometrists with a guarantee of up to \$30,000 per year to be offset by eye examination fees collected by the optometrists. Not surprisingly, the trial court found that defendants' activities violated Business & Professions Code § 2556 and Civil Code § 3369 and enjoined defendants from doing so. In substance, the trial court enjoined the defendants from (1) employing or maintaining an optometrist in or near the premises used for optical dispensing in violation of § 2556 of the Business & Professions Code; and (2) engaging in unfair competition within the meaning of Civil Code § 3369(3) by performing any or all of the above acts.

On appeal, defendants contend:

- (1) That Civil Code § 3369 is not

applicable to this situation and as a result plaintiffs have no standing to seek injunctive relief.

Civil Code § 3369 defines unfair competition as "unlawful, unfair. . .business practices." Defendants attempt to avoid the impact of section 3369 by reliance on International Etc., Workers v. Landowitz, 20 Cal.2d 418. Unfortunately for defendants, Landowitz was decided before the 1969 amendment to Civil Code § 3369 which added the word "unlawful" to the concept of unfair business practices. As Barquis v. Merchants Collection Assn., 7 Cal.3d 94, points out, the old common law concept of unfair business practices has been enlarged by the 1969 amendment for the protection of the public and now clearly includes unlawful activities. Since, as we shall see, defendants' business practices were clearly unlawful under Business & Professions Code § 2556, Civil Code § 3369 is applicable and plaintiffs have standing under that section to seek injunctive relief.

(2) That Business & Professions Code § 2556 is unconstitutionally vague. Not so.

Business & Professions Code § 2556 provides in substance that it is unlawful for an optician to advertise the furnishing of or to furnish the services of an optometrist or to directly or indirectly employ or maintain an optometrist on or near the premises used for optical dispensing.

The policy underlying such a law is clear. An optometrist is a professional man; his duty is to examine patients to determine whether or not they need glasses. If they do, he prescribes them. If not, he doesn't. The optician, on the other hand, is a business man. He sells glasses for a profit. The motives of the two are inconsistent. This section insures that the patient will have the undivided loyalty of his optometrist and not share that loyalty with an optician who is interested in selling glasses. Thus, as applied to the facts of this case, an optician who is giving fully-equipped premises to optometrists virtually rent free, and guaranteeing them up to \$30,000 per year, creates a situation in which the optometrist can hardly remain ignorant of the

fact that the reason he is receiving the money is to examine eyes and write prescriptions.

Defendants fault the statute for the use of the word "near" and conjure up horrible examples of how that word may be misconstrued. However, it is a basic of constitutional interpretation that one cannot attack a statute as unconstitutional on the ground that it might conceivably be administered against someone else in an unreasonable way.

There is manifestly nothing vague about "advertising," "furnishing," "employing," or "maintaining." (See Drucker v. State Board of Medical Examiners, 143 Cal. App.2d 702.) As to the word "near," it cannot be said that the word is so vague and ambiguous that the statute is unconstitutional. Certainly, it is not as exact as the word "on." However, most words have a certain flexibility in meaning. And here when the facts show clearly that the defendants maintained optometrists in partitioned off offices or immediately next door or contiguous to the offices of

opticians, then there can be no question but that the offices were "near" and came within the statute.

(3) That the intervenors have no standing. They have.

Defendants contend that since the plaintiff optometrists came in under Civil Code § 3369 for injunctive relief that the Board of Medical Examiners has now unlawfully "enlarged the action" by alleging that these acts constituted a violation of Business & Professions Code § 2556. Thus, they reason the intervenors have no standing. This contention lacks merit.

Plaintiffs' original action was to enjoin the defendants from committing unlawful acts. Civil Code § 3131 authorizes such an action. Additionally, that section authorizes the Attorney General or Board of Medical Examiners to effect the same injunctive relief. Section 2559 of the Business & Professions Code authorizes the Board of Medical Examiners to request injunctive relief against violations of Business & Professions Code § 2556. Thus, under the statute and under the principle

that intervention is proper to avoid multiplicity of lawsuits, the injunction was clearly proper. Actually, the defendants benefit from the intervention, otherwise, they would have to defend two lawsuits.

(4) That the defendants' actions did not violate Business & Professions Code § 2556. They did.

In this regard, defendants rely on Drucker, supra, which supports their position not in the least. In Drucker, the opticians made premises available to optometrists. In some cases rent was paid by the optometrists and in all cases the optometrists maintained their own equipment and retained the fees charged. The court found that this evidence did not support the charge that the opticians either furnished, employed or maintained the optometrists. Here, the optometrists were paid what amounted to a salary or retainer by way of a guarantee up to \$30,000 per year. They were furnished free fully-equipped offices. They were clearly subject to the optician's control as to the filing of business reports and the keeping of business hours. The words "furnish,"

"employ," and "maintain" are the key words in Business & Professions Code § 2556. Clearly the evidence supports the trial court's finding that the opticians furnished, employed and maintained the optometrists in this case.

Judgment affirmed.

/s/ Gardner
P.J.

We concur:

/s/ Tamura

/s/ McDaniel

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

APPENDIX B

Business & Professions Code

Unlawful Acts

2556. It is unlawful to do any of the following: To advertise at a stipulated price or any variation of such a price or as being free, the furnishing of a lens, lenses, glasses or the frames and fittings thereof; to advertise any examination or treatment of the eyes in connection with the sale of eyeglasses, spectacles, or the parts thereof; to insert any statement in any advertising in connection with the business of dispensing optician which is false or tends to mislead the public; to make use of any advertising statement of a character tending to indicate to the public any superiority of any particular system or type of eyesight examination or treatment over that provided by other licensed ocular practitioners; to advertise the furnishing of, or to furnish the services of a refractionist, an optometrist, a physician and surgeon; to directly or indirectly employ or maintain on or near the premises used for optical dispensing, a refractionist, an optometrist, a physician and surgeon, or a practitioner of any other profession for the purpose of any examination or treatment of the eyes; or to duplicate or change lenses without a prescription or order from a person duly licensed to issue the same.

Penalty

2558. Any person who violates any of the provisions of this chapter is guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment in the county jail not less than 10 days nor more than one year, or by a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) or by both such fine and imprisonment.

Rules and Regulations

The Board of Medical Examiners may adopt, amend, or repeal, in accordance with the provisions of the Administrative Procedure Act, such rules and regulations as are reasonably necessary to carry out the provisions of this chapter.

(Amendment by Stats. 1957, Ch. 2064.)



Supreme Court, U. S.

FILED

DEC 9 1977

MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-617

TERMINAL-HUDSON ELECTRONICS, INC.,
OF CALIFORNIA, dba OPTI-CAL,
Petitioner,

vs.

ROBERT O. DUNDAS, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal
of the State of California, Fourth Appellate District

**BRIEF FOR ALL RESPONDENTS EXCEPT CALIFORNIA
BOARDS OF OPTOMETRY AND MEDICAL EXAMINERS
IN OPPOSITION**

WILKE, FLEURY, HOFFELT & GRAY,
555 Capitol Mall, Suite 1100,
Sacramento, California 95814,
Telephone: (916) 441-2430.

*Counsel for all Respondents except for the
California State Boards of Optometry
and Medical Examiners.*

Subject Index

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statute involved	3
Statement of the case	3
Argument	5
Conclusion	6

Table of Authorities Cited

Cases	Pages
United States v. Raines, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed. 2d 524 (1960)	5

Codes

Business and Professions Code, Section 2556	2, 3, 5
---	---------

Statutes

28 U.S.C., Section 1257(2)	2
----------------------------------	---

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-617

TERMINAL-HUDSON ELECTRONICS, INC.,
OF CALIFORNIA, dba OPTI-CAL,
Petitioner,

vs.

ROBERT O. DUNDAS, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal
of the State of California, Fourth Appellate District

**BRIEF FOR ALL RESPONDENTS EXCEPT CALIFORNIA
BOARDS OF OPTOMETRY AND MEDICAL EXAMINERS
IN OPPOSITION**

OPINIONS BELOW

None of the opinions in this cause have been reported.

JURISDICTION

The opinion of the Court of Appeal of California, Fourth Appellate District, was filed on June 24, 1977, affirming the civil judgment of the Superior Court of Orange County in favor of respondents (plaintiffs and plaintiffs-in-intervention) of February 6, 1976. On July 12, 1977, the Court of Appeal denied a Petition for Rehearing. Thereafter, on August 18, 1977, the Supreme Court of California denied a Petition for Hearing. On October 19, 1977, petitioner filed in the Court of Appeal of California, Fourth Appellate District, Second Division, a Notice of Appeal to this Court. On October 27, 1977, petitioner filed its Petition for Writ of Certiorari, attempting to invoke the jurisdiction of this Court under 28 U.S.C. Section 1257(2).

QUESTION PRESENTED

Whether the use of the word "near" in California Business and Professions Code Section 2556 renders that statute unconstitutionally vague as applied to an optician who maintained optometrists in offices that were either a part of, or contiguous to, the optician's offices.

STATUTE INVOLVED

The only statute challenged by the Petition is California Business and Professions Code Section 2556, governing registered dispensing opticians, which states in pertinent part:

"It is unlawful to do any of the following: . . . to directly or indirectly, employ or maintain on or near the premises used for optical dispensing . . . an optometrist . . . for the purpose of any examination or treatment of the eyes . . ."

STATEMENT OF THE CASE

Respondents are thirty-four licensed optometrists who practice in or around Orange County, California. On September 24, 1971, they commenced an action for injunctive relief against petitioner (defendant below), a corporate chain registered dispensing optician. The action challenged numerous violations of California Business and Professions Code Section 2556 which forbids opticians

". . . to directly or indirectly, employ or maintain on or near the premises used for optical dispensing . . . an optometrist . . . for the purpose of any examination or treatment of the eyes . . ."

Subsequently, respondents, California State Boards of Optometry and Medical Examiners (now entitled Board of Medical Quality Assurance), were allowed to intervene as plaintiffs.

After trial, the Superior Court of Orange County made numerous findings of fact. On appeal to the California Court of Appeal, Fourth Appellate District, those findings were summarized in the Court's decision, which affirmed the judgment of the Superior Court (see pp. 2-3 of the Opinion, attached as Appendix A to the Petition):

"The evidence disclosed, and the trial court found, that defendants established offices to sell glasses in shopping centers, then partitioned off a portion of the premises for optometrists' offices. Defendants completely furnished the offices of the optometrists with equipment and used strawmen to sublease the offices to the optometrists. Defendants exercised complete control of the optometrists. Defendants made appointments for them and advertised for them. The optometrists filed daily reports with and had their working hours approved by the defendants. Sometimes defendants' employees answered the telephone for the optometrists and on one occasion defendants cancelled an optometrist's lease when he took an unauthorized vacation. Defendants charged nominal or no rental for these fully-equipped optometrists' offices and further provided the optometrists with a guarantee of up to \$30,000 per year to be offset by eye examination fees collected by the optometrists. Not surprisingly, the trial court found that defendants' activities violated Business & Professions Code Section 2556 and Civil Code Section 3369 and enjoined defendants from doing so. In substance, the trial court enjoined the defendants from (1) employing or maintaining an optometrist in or near the premises used for optical dispensing

in violation of Section 2556 of the Business & Professions Code; and (2) engaging in unfair competition within the meaning of Civil Code Section 3369(3) by performing any or all of the above acts."

The California Supreme Court then denied petitioner's request for a hearing.

ARGUMENT

Petitioner's only contention appears to be that Section 2556 is unconstitutionally vague as applied to it in this action. This contention is patently frivolous.

The Court of Appeal noted (see pp. 6-7 of Appendix A to the Petition) that the evidence clearly demonstrated that petitioner maintained optometrists in offices that were either next door to petitioner's offices or were only separated from them by a partition. Certainly a person of ordinary intelligence would know beyond a shadow of a doubt that the term "near" applied to such a context. Since the statute is not vague as applied to petitioner, petitioner lacks standing to challenge its potential application in other situations. E.g., *United States v. Raines*, 362 U.S. 17, 21-22, 80 S.Ct. 519, 523, 4 L.Ed. 2d 524, 529-530 (1960). Therefore, the decision of the Court of Appeal is clearly in accord with the applicable decisions of this Court and the Petition should be denied.

CONCLUSION

The opinion of the Court of Appeal thoroughly considered petitioner's contention and found it wanting. That decision clearly conforms to settled principles of constitutional interpretation established by this Court. Therefore, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Dated, December 2, 1977.

Respectfully submitted,

WILKE, FLEURY, HOFFELT & GRAY,

By WILLIAM A. GOULD, JR.,

ALAN G. PERKINS,

*Counsel for all Respondents except for the
California State Boards of Optometry
and Medical Examiners.*